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In Th

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.:78-1851

JOSEPH S. HARRIS,

Petitioner,

v.

H. SCHULDT REEDEREI,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

REPLY TO PETITION FOR REHEARING

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Respondent, H. Schuldt Reederei, pursuant to an invitation extended by and contained within an Order of this Court dated May 12, 1980, replies herewith to the Harris' Petition for Rehearing and respectfully urges that this most recent petition be denied.

Petitioner seeks a rehearing upon the sole ground of a conflict between the Circuits on the question of the standard of care owed longshoremen by shipowners under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*, the very same issue asserted by Harris' earlier Petition for Certiorari considered and denied by this Court at the commencement of this term.

More to the point perhaps, the *Harris* case did not, in fact, turn in the Court below on the issue of shipowners' "standard of care" as a careful analysis of the Fourth Circuit's per curiam opinion will reveal, nor does the factual background of this case lend itself to an appropriate resolution of this issue either jointly with or separately from the case of *De Los Santos* v. *Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979) cert. granted _____ U.S. _____, No. 79-512, pending in this Court on a Writ granted May 12, 1980.

On trial in Harris, petitioner's explanation for his accident was a "drifting winch"; yet that explanation was not reflected in his initial version of this accident, nor supported by the mechanical characteristics of the electric winches aboard the M/V MEXICAN TRADER. Equally disquieting, petitioner's version of his accident was not supported by a tender on Harris' part of the testimony of either his *gang boss* or a *single regular member* of his gang. Placing this claim in its most favorable light, Harris' accident was immediately and undisputedly caused through the mishandling of a draft by he and his fellow longshoremen in a situation wherein the stevedore's operation of the ship's winch was in breach of a specific duty to stop work placed upon the *employer* (i.e., Stevedore) by the provisions of the Safety and Health Regulations for Longshoring (29 C.R.F. 1918.53). The jury's verdict went against Harris on all questions, and certainly this finding was supported by ample uncontradicted testimony which formed the basis of the decision of the Court below.

Relying on the *rule* enunciated initially in *Riddle* v. *Exxon Transportation Company*, 563 F.2d 1103 (4th Cir. 1977), and subsequently approved in *Chavis* v. *Finnlines, Ltd., O/Y*, 576 F.2d 1072 (4th Cir. 1978), the Fourth Circuit Court of Appeals simply concluded in *Harris* that there could be no recovery regardless of the applicable negligence standard applied where, as here, the undisputed evidence reflected that the accident was caused *solely* by the negligence of the stevedore and its employees. *See, Edmonds* v. *Compagnie*

Generale Transatlantique, _____ U.S. _____, 99 S.Ct. 2753 (1979).

In fact, the *rule* of the Fourth Circuit as espoused by Circuit Judge Donald Russell so clearly in *Riddle, supra,* was likewise recognized in principle by Mr. Justice Byron White in *Edmonds, supra,* by way of footnote #15 within the opinion of the Court. Speaking for the Court in *Riddle,* Judge Russell stated the *rule* quite succinctly and clearly in the following language:

> "But, whether the statement of the District Court in the challenged instruction was erroneous for not qualifying the vessel's immunity for 'open and obvious' dangers in line with the modern rule (i.e., §343A) is irrelevant in this case and its use by the District Court would, if erroneous, be at most harmless error. *This is so because plaintiff's injuries resulted solely from the negligence of the (shipyard) and its employees;* . . . And this is so, irrespective of whether the condition resulting in plaintiff's injuries was 'open and obvious' or not . . . ." 563 F.2d at 1112 (emphasis added).

Contrary to an assertion contained on Pages 5-6 of the Petition for Rehearing that the Fourth Circuit Court of Appeals had approved the instruction given by the trial court on shipowner's standard of care duty in *Riddle* and therefore, *Harris,* it is clear that the Court below did not find it necessary to make such a determination and therefore did not reach this issue in either of these cases. Furthermore, while petitioner now seeks to come within the mandate of an opinion of the Ninth Circuit in *De Los Santos, supra,* and other recent cases which promulgate a standard of care based on maritime principles similar to that enumerated by this Court earlier in the passenger case of *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), Harris neither requested nor offered a negligence charge based on maritime principles at the trial stage. Rather he requested solely a charge founded on land based principles and more particularly Section 343A of the Restatement.

Under Rule 58(2) of the Rules of the Supreme Court, the petitioner is subject to stringent limitations regarding the matters which may be raised by a petitioner for rehearing following the denial of a writ of certiorari. Specifically, this rule provides that such petition must be limited to *"grounds which are confined to intervening circumstances of substantial or controlling effect . . . or to other substantive grounds available to petitioner although not previously presented."* Harris has failed utterly to abide by or comply with this requirement as petitioner's original petition asserted the very same conflict between the Circuits as raised here with respect to the standard of care owed by the shipowner under the 1972 Amendments, and more particularly the purported conflict between the Fourth Circuit in *Harris* and the Ninth Circuit in *De Los Santos* on this issue. While this alleged conflict is more illusory than real, as indicated in respondent's brief in opposition to the petition for writ of certiorari, it is nevertheless an issue fully briefed and explored in Harris' original petition. His second petition raises no substantive grounds not previously presented. No material changes in the decisions of the Circuits have occurred since this Court denied the writ which would now compel a reconsideration of the *Harris* appeal.

Interestingly petitioner neglected to certify as required by the specific provisions of Rule 58(2) of the Rules of Supreme Court that his Petition for Rehearing is "restricted to the grounds specified" within that rule, and rather obviously this omission could not have been unintentional in view of the content of this Petition for Rehearing.

Compelling reasoning dictates that this Petition for Rehearing should be denied, these grounds being:

1. *Harris* did not turn on the issue of shipowner's standard of care, nor was it decided by the Court below on such basis.

2. This case does not present a clear cut or factually appealing background for a proper con-

sideration of the issue of shipowner's standard of care.

3. Petitioner is barred by the express provision of Rule 58(2) of this Court from reconsideration having raised the very same ground previously in his Petition for Certiorari.

4. Petitioner has failed to present any cogent reason why this case should be considered either jointly with or apart from *De Los Santos* upon the issue of shipowner's standard of care under the 1972 Amendments to Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. 901, *et seq.*

For all of the above reasons, it is respectfully submitted that the Petition for Rehearing should be denied.

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